

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

JEANNETTE PRICHARD, as Owner and
Managing Agent,

Respondent.

MICHELLE ENGLISH, individually and as
Guardian Ad Litem for KOREN ENGLISH, a
minor; and KIMBERLY ENGLISH, a minor,

Complainants.

Case No.

H200708- Q-0028-03

C 08-09-005

10-01-P

DECISION

Administrative Law Judge Joseph A. Ragazzo heard this matter on behalf of the Fair Employment and Housing Commission on February 4, 2009 in Lakeport, California. Staff Counsel Jason R. Cale represented the Department of Fair Employment and Housing. Respondent Jeannette Prichard appeared *in pro per*.

The Commission received the hearing transcript on February 19, 2009. The DFEH's post-hearing brief was received on March 20, 2009, and the case was deemed submitted on that date. Judge Ragazzo issued his proposed decision on April 10, 2009.

On April 16, 2009, the Commission decided not to adopt the proposed decision and notified the parties of the opportunity to file further argument. On May 11, 2009, the Commission invited the California Apartment Association to file an amicus brief addressing the issues raised in this case and extended the time for the parties and amici to file further argument. Both the DFEH's further argument brief and the California Apartment Association's amicus brief were timely received on June 22, 2009.

On June 25, 2009, the Commission took official notice that respondent Jeannette Prichard had filed for Chapter 7 bankruptcy. The Commission requested further briefing from the DFEH to address the legal effect of respondent's bankruptcy filing and to

respond to issues raised in the amicus brief. On July 13, 2009, the DFEH's reply brief was received.

After consideration of the entire record, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On May 23, 2008, Michelle English ("English" or "complainant"), individually and on behalf of her two minor children Koren and Kimberly English, filed three written, verified complaints with the Department of Fair Employment and Housing (DFEH) against David and Mary Danchuk, Anna Girod, and AGM Property Management. English's complaints alleged that, on or about June 17, 2007, she and her children were denied rental of a single family home on the basis of familial status, in violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) ("FEHA").

2. On June 11, 2008, English individually and on behalf of her minor children Koren and Kimberly English, filed an additional written, verified complaint with the DFEH against Jeanette [*sic*] Prichard. English's complaint against Prichard also alleged that, on or about June 17, 2007, she and her children were denied rental of a single family home because of familial status, in violation of the FEHA.

3. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On July 31, 2008, Phyllis W. Cheng, in her official capacity as Director of the DFEH, issued an accusation against David Danchuk, Mary Danchuk, AGM Property Management, Anna Girod, and Jeanette [*sic*] Prichard. The accusation alleged that all five named parties were jointly and severally liable for violating Government Code section 12955, subdivisions (a), (c), (g) and (k). Specifically, the accusation alleged that the parties violated the FEHA by refusing to rent a housing accommodation to English and her children on the basis of familial status; by making statements of preference or an intention to discriminate because of complainant's familial status; by aiding and abetting discriminatory housing practices; and by otherwise denying or making unavailable a dwelling because of complainant's familial status.

4. On or about August 19, 2008, respondents AGM Property Management and Anna Girod, through their attorney Gregory Schrader, Esq., filed a Notice of Transfer of Proceedings to Court.

5. On or about August 20, 2008, respondents David Danchuk and Mary Danchuk, through their attorney Timothy J. Hannan, Esq., filed a Notice of Transfer of Proceedings to Court. The DFEH proceeded with this administrative case against Prichard, as the sole respondent before the Commission.

6. On September 26, 2008, the DFEH issued a First Amended Accusation alleging that Jeanette [sic] Prichard¹ (“Prichard” or “respondent”), as owner and managing agent, violated Government Code section 12955, subdivisions (a), (c), (g) and (k). The accusation realleged that respondent violated the FEHA as detailed in the original July 31, 2008 accusation.

7. At all times relevant to this matter, the real property at issue was a two bedroom house for rent located at 108 North Marina Drive, Lakeport, California. (“Marina Drive”). Marina Drive was a “housing accommodation” within the meaning of Government Code section 12927, subdivision (d), and 12955, subdivisions (a) and (c), and a “dwelling” within the meaning of Government Code section 12955, subdivision (d).

8. At all times relevant to this matter, Marina Drive was owned by David Danchuk and Mary Danchuk (“the Danchuks”), and was managed by AGM Property Management (“AGM”), located in Lakeport, California. AGM is owned and operated by Anna Girod (“Girod”).

9. Beginning in April, 2007, Prichard was employed at AGM as an associate “trainee” for approximately three months. She reported directly to Girod. Her duties at AGM included processing rental applications, conducting background checks on prospective renters, coordinating maintenance on rental properties, and conducting property inspections. Prichard was a “person” within the meaning of Government Code sections 12927, subdivision (f), and 12955, subdivision (c).

10. In June 2007, English lived in a two bedroom rental apartment on Royale Avenue in Lakeport, California, with her minor twin daughters Koren and Kimberly. English wanted to move her family to a larger and more desirable home.

11. Sometime in early June 2007, English drove by Marina Drive and observed a “For Rent” sign on the property. She called the AGM telephone number listed on the sign and drove to the AGM offices with her two daughters. At AGM, English spoke to Prichard about renting Marina Drive, obtained the keys to the rental, and then drove back to Marina Drive with her daughters to inspect the rental property.

12. On or about June 6, 2007, English submitted her two-page application for Marina Drive to Prichard and paid \$20.00 to AGM for a nonrefundable screening fee. On the application, English indicated that Marina Drive was for herself and her two daughters. English also disclosed her employment, credit, and residence history, and submitted the names of personal references on the rental application form.

¹ At hearing, the DFEH orally amended its First Amended Accusation to reflect the correct spelling of respondent’s first name to “Jeannette” Prichard.

13. The rent for Marina Drive was \$995.00 per month. When English submitted her application to AGM, Marina Drive was available for rent.

14. AGM had written guidelines which accompanied its rental applications. The qualifying criteria for renting property managed by AGM included the following: “applicant’s current and previous rental references are in good standing; applicant’s verifiable income must meet or exceed 2 1/2 times the monthly rent; and applicant’s credit report must meet our guidelines, unless a satisfactory explanation in writing can be provided.”

15. On or about June 14, 2007, Prichard performed a background check on English. After running her credit report and contacting her landlord and employer, Prichard prepared an AGM applicant report. Prichard’s report noted that English had a history of promptly paying her rent, verified English’s \$2,500.00 monthly income at the U.S. Postal Service, and indicated that English’s credit report had an acceptable credit score of 635. Under AGM’s guidelines, English qualified to rent Marina Drive.

16. Prichard subsequently placed a post-it note on English’s rental application file on which she had written the following: “This applicant has eight-year-old twin daughters who are very high energy and rambunctious. She wants 108 North Marina, but I understand that Westlake is not a great kid place - should I steer her to another property, and if so, how do I do that?” Just below Prichard’s hand-written note was a hand-written reply prepared by Girod. It stated: “Must find another home as per owner.”

17. On or about June 17, 2007, Prichard informed English, by telephone, that she could not rent the Marina Drive house because “the owner is not interested in [renting to] children” or words to that effect. Prichard then directed her to another rental located in Kelseyville, the next town south of Lakeport.

18. After English was told she could not rent Marina Drive, she remained at the Royale Avenue apartment until approximately September 2008, when she and her two daughters moved into her parents’ home in Lakeport.

DETERMINATION OF ISSUES

Liability

The DFEH asserts that respondent is liable for unlawful housing discrimination in violation of Government Code section 12955, subdivisions (a), (c), (g), and (k). Specifically, the DFEH contends that Prichard is liable for unlawful housing discrimination by refusing to rent a housing accommodation to English and her daughters on the basis of familial status; by making statements of preference or an intention to discriminate because of complainant’s familial status; by aiding and abetting discriminatory housing practices; and by otherwise

denying or making unavailable a dwelling because of complainant's familial status. Respondent denies all of the DFEH's allegations. In its support of its case against respondent, the DFEH presented the testimony of Michelle English and her daughter Koren English, along with various documents obtained from AGM. The DFEH also examined Jeannette Prichard as an adverse witness. Prichard, appearing *in pro per*, cross-examined Michelle English and presented her own testimony.

In its amicus brief, the California Apartment Association (the CAA) asserts that holding Prichard, who is neither an owner nor a managing agent, personally liable for discrimination or aiding and abetting would be inconsistent with California Supreme Court rulings on personal liability for comparable provisions of the FEHA in the employment context. (*Reno v. Baird* (1998) 18 Cal.4th 640, *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158.) Because we find the DFEH did not prove Prichard violated the FEHA, we do not address the merits of this argument.

A. Government Code section 12955, subdivision (a)

The DFEH first argues that respondent violated Government Code section 12955, subdivision (a), by refusing to rent Marina Drive to complainant because she had children.

The FEHA prohibits discrimination in housing on the basis of familial status. Government Code section 12955, subdivision (a), provides that it is unlawful for the owner of a housing accommodation to discriminate against any person because of his or her familial status. Familial status under the FEHA covers parents residing with children under the age of 18. (Gov. Code, § 12955.2.) Such discrimination includes, inter alia, the "refusal to rent or lease housing accommodations." (Gov. Code, § 12927, subd. (c)(1).) Under this section, housing discrimination is established when a preponderance of the evidence demonstrates that familial status was a motivating factor for respondent's conduct, even though other factors may have also motivated the conduct. (Gov. Code, § 12955.8, subd. (a); *Dept. Fair Empl. & Hous. v. Jevremov* (Feb. 5, 1997) No. 97-02, FEHC Precedential Decs. 1997, CEB 1, p. 7 [1997 WL 253179 (Cal. F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. McWay Family Trust* (Oct. 2, 1996) No. 96-07, FEHC Precedential Decs. 1996, CEB 1, p. 15 [1996 WL 774922 (Cal. F.E.H.C.)].)

The DFEH presented credible evidence to establish that English was denied Marina Drive because she had children. The record established that English met all of the qualifications for renting property under AGM rental guidelines, and that Marina Drive was available for rent at the time English submitted her application. The evidence also established that during the course of the rental process, Prichard notified Girod, her boss, in a written post-it note, that English had twin daughters. In the same post-it note, Prichard asked Girod whether she should "steer" English to another property. The record further established that Girod instructed respondent, in writing, to "find another home as per owner." The DFEH established Prichard subsequently informed English that she could not rent Marina Drive because the owner did not want a tenant with children and directed her to another rental property.

Prichard denies she is liable under the FEHA, asserting she did not discriminate against complainant. Prichard maintains she did not make the decision to deny Marina Drive to English, and, with respect to the written post-it note, she asserts that she was only reporting her personal observations about English to her boss, Girod, and seeking clarification on whether Marina Drive was an adult-only property. Moreover, Prichard asserts she did not speak with English about the Danchuks' refusal to rent. Finally, Prichard argues that she was a new AGM trainee, had no intent to discriminate, and because her role in the matter was limited to providing information between English and Girod, she should not be held liable under the FEHA.

On this record, and the evidence presented in the case, we must determine whether respondent is liable under Government Code section 12955, subdivision (a), as an "owner of a housing accommodation" who discriminated against complainant on the basis of familial status.²

Whether Prichard was a Managing Agent

An owner of a housing accommodation under the FEHA includes, inter alia, the "managing agent, real estate broker or salesperson, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations." (Gov. Code, § 12927, subd. (e).) The DFEH asserts that Prichard was a managing agent of AGM, and may be held liable for housing discrimination on the basis of familial status under Government Code section 12955, subdivision (a).

"Managing agent" is not defined under the FEHA, nor does any reported case law interpreting housing law under the FEHA define the term. The DFEH asserts we must construe the term broadly, to impose liability on all agents, including Prichard, to the same extent as it exists under the federal Fair Housing Act (FHA).³

² In a response to the Notice of Opportunity for Further Argument issued April 19, 2009, Prichard informed the Commission that she had filed for bankruptcy on May 29, 2009. On June 25, 2009, we took official notice of Prichard's Chapter 7 bankruptcy filing. Title 11 U.S.C. section 362, subdivision (a), provides that the filing of a bankruptcy petition operates as an automatic stay of proceedings against the debtor. However, a "proceeding by a governmental unit to enforce such governmental unit's police or regulatory power is exempt from the automatic stay." (11 U.S.C. § 362, subd. (a) and (b) (4); (*Dept. Fair Empl. & Hous. v. SD City Event, Inc.* (Mar. 27, 2007) No. 07-01-P [2007 WL 1319446, at p. 7-8 (Cal.F.E.H.C.).])

³ Government Code section 12955, subdivision (a), differs from section 804 (42 U.S.C. § 3604) of the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) ("FHA"), which also prohibits refusing to rent or lease housing accommodations on the basis of familial status, in that section 12955, subdivision (a) applies only to an "owner of any housing accommodation" as defined by Government Code section 12927, subdivision (e). The FHA, in contrast, lists unlawful acts, such as refusal to rent, without specifying who can be found liable for committing these acts, such as a managing agent. HUD regulations define the term "agent" under the FHA as "any person authorized to perform an action on behalf of another person regarding any matter related to the ... rental of dwellings, including offers, solicitations or contracts, and the administration of matters regarding such

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Black's Law Dictionary defines managing agent, as a person "with general power involving the exercise of judgment and discretion, as opposed to an ordinary agent who acts under the direction and control of the principal." (Black's Law Dict. (8th ed. 2004) p. 70, col. 1.) Similarly, the California Supreme Court has defined "managing agents" for the purposes of imposing punitive damage liability, as "supervisors who have broad discretionary powers and exercise substantial discretionary authority." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 577.) Additionally, BAJI No. 14.74, provides that the term "managing agent" includes only those employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. (BAJI No. 14.74 [Spring 2009 Edition].) In short, this authority suggests that at the very least, a managing agent must possess some independent authority and discretion in carrying out the business operations of his or her employer.

Here, the record established that the Danchuks were the legal owners of Marina Drive and that AGM, owned and operated by Girod, was hired by the Danchuks to serve as their property agent. AGM's responsibility was to find tenants, conduct interviews and background checks, and coordinate the rental agreement between landlord and tenant. The record established that there was an agency relationship between AGM and the Danchuks and that AGM, as the Danchuks' property management agent, not only had authority to show the property to prospective tenants, but also exercised its discretion to determine the types of individuals who would be recommended as prospective tenants.

In contrast, Prichard was AGM's employee. Her duties included processing rental applications, conducting background checks on prospective renters, coordinating maintenance on rental properties, and conducting property inspections. She reported directly to Girod, and followed the instructions given to her as part of her duties. The record failed to establish that Prichard had broad discretionary powers, or that she ever exercised substantial discretionary authority while working for AGM. Hence, respondent had no authority to refuse to rent to complainant. Instead, the evidence presented at the hearing established that it was Girod, based on the owners' preference, who instructed Prichard not to rent the house to English. Thus, for the purposes of liability under Government Code section 12955, subdivision (a), this decision finds that respondent was not a managing agent under the FEHA. While liability is not limited only to managing agents, the record established Prichard had no right to rent or lease Marina Drive.

³ (Continued)
offers, solicitations or contracts of any residential real estate-related transactions." (24 C.F.R. § 100.20 ["agent" definition]. Case law emphasizes finding owners liable for the actions of their agents rather than on individual agent liability. (See e.g., *Harris v. Itzhahi* (9th Cir. 1999) 183 F.3d 1043, 1054 [owners can be held liable for statements of "agent"].) In its closing brief, the DFEH relies on an unpublished federal case that we decline to cite or rely upon under California Rules of Court, rule 8.115.

Therefore, we find Prichard is not liable for violating Government Code section 12955, subdivision (a).⁴

B. Government Code section 12955, subdivision (c)

The DFEH also alleges that respondent is liable under Government Code section 12955, subdivision (c). This subdivision makes it unlawful for “any person”, “to make . . . any . . . statement . . . with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination . . . based on . . . familial status.”

A statement made with respect to the rental of housing violates Government Code section 12955, subdivision (c) when either 1) it is facially or expressly discriminatory or 2) it suggests a preference or limitation to the ordinary, reasonable reader or listener.⁵ (*U.S. v. Hunter* (4th Cir. 1972) 459 F.2d 205, 216, *cert. den.*, 409 U.S. 934; *Ragin v. New York Times Co.* (2nd Cir. 1991) 923 F.2d 995, 999-1000, *cert. den.*, 502 U.S. 821.) Under the latter test, the language of the alleged discriminatory statement should be interpreted naturally as it would be interpreted by an ordinary, reasonable reader or listener. (*U.S. v. Hunter, supra*, 459 F.2d at p. 215.) The ordinary, reasonable reader or listener “is neither the most suspicious nor the most insensitive of our citizenry.” (*Ragin v. New York Times Co, supra*, 923 F.2d at p. 1002.)

To establish a violation of Government Code section 12955, subdivision (c), the DFEH must prove respondent made oral or written statements which indicated preference, limitation, discrimination, or indicated the intention to prefer, limit or discriminate based upon complainant’s familial status.

At the hearing, the DFEH asserted that Prichard made two discriminatory statements. First, that Prichard wrote on a post-it note to Girod, AGM’s owner, that “[English] has eight-year-old twin daughters who are very high energy and rambunctious. She wants 108 North Marina, but I understand that Westlake is not a great kid place - should I steer her to another property, and if so, how do I do that?” And second, that Prichard subsequently told English, via telephone, that “the owner is not interested in [renting to] children”.⁶ Prichard admits writing the first statement, but denies she did so with discriminatory intent.

⁴ This decision does not hold that a property management agency that follows orders from its principal cannot be found liable under the FEHA. Federal courts have routinely held that agents who violate the FHA on orders from their principal are liable for their own unlawful conduct in fair housing cases. (See e.g. *Jeanty v. McKey & Poague, Inc.* (7th Cir.1974) 496 F.2d 1119, 1120-1121 [Rental management company liable for Fair Housing violations, even where actions were at the behest of the principal].)

⁵ California courts rely on federal housing discrimination law to interpret analogous provisions of the FEHA. (*County of Alameda v. Fair Empl. & Hous. Com.* (1984) 153 Cal. App.3d 499, 504.) The federal analog to Government Code section 12955, subdivision (c), also provides, inter alia, that it is unlawful to make a statement that indicates preference or discrimination based on familial status. (42 U.S.C. § 3604(c).)

⁶ In both the accusation and the first amended accusation, the DFEH asserted that Girod, not Prichard, telephoned English and told her “the owner is not interested in [renting to] children”.

Furthermore, Prichard denies she made the second statement. The CAA argues that even if Prichard made these statements, the law does not support individual liability for an employee communicating discriminatory decisions of property managers and owners.

On this record, and the evidence presented in the case, we must determine whether the statements are discriminatory, and whether Prichard is liable under Government Code section 12955, subdivision (c) for making a discriminatory statement.

Whether Prichard is Liable for Writing a Discriminatory Statement

The DFEH asserts that respondent, on her own initiative, independently made a written, unlawful statement of preference and admitted during her testimony that she made the subjective determination that Marina Drive was inappropriate for children. Respondent denies that she wrote the note with any discriminatory intent, asserting that she was seeking guidance from her boss about whether the property was for adults only.

The first statement, although mentioning children, does not explicitly express an animus towards an applicant with children or a preference for an applicant without children. When examining an isolated statement, it is important to consider the statement in context, including the speaker's intent. "[I]t is for this reason that fact finders may examine intent, not because a lack of design constitutes an affirmative defense to an FHA violation, but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it . . . such evidence may prove especially helpful where, as here, a court is charged with ascertaining the message sent by isolated words rather than a series of ads or an extended pattern of conduct." (*Soules v. United States Dep't of Housing & Urban Dev.* (2d Cir. N.Y. 1992) 967 F. 2d 817, 825.)

We find that Prichard wrote the post-it note as a trainee seeking guidance on whether the property could be rented to English and how to proceed if English's application was not accepted for the property. Because of her experience when visiting the property, Prichard was unsure if the property was within an adult community. It is reasonable to conclude that an ordinary reader would understand the post-it note to be a query from a low-level trainee to a supervisor, not a suggestion of preference or limitation. Because it is neither facially discriminatory nor does it suggest a limitation or preference to the ordinary reader, the written statement is not discriminatory.

Therefore, we find Prichard is not liable under Government Code section 12955, subdivision (c).

Whether Prichard is Liable for Speaking a Discriminatory Statement

The DFEH asserts that when respondent told complainant "The owner is not interested in kids" she made an unlawful discriminatory statement. Respondent denies that she made the statement. The CAA argues that to hold respondent liable for communicating the decision of the property management and owners is tantamount to holding respondent

liable for violating Government Code section 12955, subdivision (a), which only applies to owners and managing agents.

The DFEH seeks to hold Prichard liable because she made a statement that conveyed the unlawful bias and actions of Girod and the Danchuks. The DFEH cites two federal cases that impose liability for statements that convey the unlawful bias of someone other than the statement's publisher. Both of the cases cited by the DFEH, however, are distinguished on their facts.⁷

Because of Prichard's position as a trainee who had no substantial discretionary authority while working for AGM, this case is unique. Previous Commission decisions which found liability under Government Code section 12955, subdivision (c), involved respondents who had influence or control over the leasing process; no respondents were administrative employees complying with a supervisor's instruction. (Cf. *Dept. Fair Empl. & Hous. v. Jevremov*, *supra*, 1997, CEB 1, p. 3 [Property owner held liable for asking complainant about familial status before agreeing to show her an apartment.]; *Dept. Fair Empl. & Hous. v. McWay Family Trust*, *supra*, 1996, CEB 1, at p. 4 [Property owners held liable for statements made by a property manager.]; *Dept. Fair Empl. & Hous. v. Kokado* (July 25, 1995) No. 95-05, FEHC Precedential Decs. 1994-95, CEB 3, p. 2 [1995 WL 908702 (Cal.F.E.H.C.)] [Both property owners held liable for statements made by one of the property owners.]; *Dept. Fair Empl. & Hous. v. Davis Realty Co., Inc.* (Jan. 23, 1987) No. 87-02, FEHC Precedential Decs. 1986-87, CEB 5, p. 2-3 [1987 WL 114850 (Cal.F.E.H.C.)] [Real estate agency held liable for statements made by realtor.]; *Dept. Fair Empl. & Hous. v. Gwen-Bar, Inc.* (Aug. 4, 1983) No. 83-18, FEHC Precedential Decs. 1982-83, CEB 17, p. 2 [1983 WL 36467 (Cal.F.E.H.C.)] [Property owner held liable for his statements.].)

Likewise, while there are many instances of 42 U.S.C. section 3604, subdivision (c) violations for isolated statements of preference, the accusations named people who exerted, or thought they exerted, control over the premises; no accusations were brought against an administrative employee. (*Harris v. Itzhaki*, *supra*, [Property owner held liable for statement by property manager.] 183 F.3d at p. 1054; *HUD v. Active Agency* (HUD ALJ 1999) Fair Hous.-Fair Lending Rptr. ¶ 25,141, at 26,159-60 [Real estate agency and real estate agents held jointly and severally liable for statements made by the real estate agents.]; *HUD v. Kormoczy* (HUD ALJ 1994) Fair Hous.-Fair Lending Rptr. ¶ 25,071, at 25,661, *aff'd*, (7th Cir. 1995) 53 F.3d 821 [Property owner held liable for statements made by property owner's

⁷ In *U.S. v. Hunter*, a newspaper was held liable for violating 42 U.S.C. section 3604, subdivision (c) when it printed a landlord's classified ad for an apartment in a "white home". (*U.S. v. Hunter*, *supra*, 459 F.2d at p. 210.) A newspaper has discretion in deciding whether or not to publish a discriminatory advertisement. In *Harris v. Itzhaki*, the corresponding federal provision, 42 U.S.C. section 3604, subdivision (c), was violated when an African-American resident of an apartment complex overheard a conversation between the resident manager and the repair man to the effect that the building's owners did not want to rent a recently vacant apartment to African-Americans. (*Harris v. Itzhaki*, *supra*, 183 F.3d at pp. 1054-55.) The 9th Circuit found that the resident manager was part of the decisional process and as such her comment showed that race factored into her decision making process. Notably, it was the building owners that were held liable for the resident manager's comment, not the resident manager herself.

mother who was showing the apartment.]; *HUD v. Schuster* (HUD ALJ 1995) Fair Hous.-Fair Lending Rptr. ¶ 25,091 [Condominium board and president of the board held liable for statements by the president and by the board's realtor.]

In making the statement to English, Prichard was merely relaying the discriminatory animus of Girod and the Danchuks. Holding administrative employees and trainees liable for divulging information of discriminatory animus or intent to members of a protected class limits the ways in which people can learn they have been denied housing for unlawful reasons. While the statute opens liability to "any person", we find it is counter to public policy to chill the ability of people who know of discriminatory motives to convey those motives without risk of liability to themselves.

Therefore, based on this record, we find Prichard is not liable for violating Government Code section 12955, subdivision (c).

C. Government Code section 12955, subdivision (k)

The DFEH further asserts in its accusation that respondent is also liable under Government Code section 12955, subdivision (k), which makes it unlawful "to otherwise make unavailable or deny a dwelling based on discrimination because of ... familial status." The DFEH has not indicated how this provision would apply to the facts in this case, nor has it cited cases or other authority in which the state or federal provision has been held to reach similar situations to the instant case.⁸

Under the federal analog, "steering" has been held to be an example of "mak[ing] unavailable" in violation of § [3604](a). (*Fair Housing Congress v. Weber* (C.D.Cal.1997) 993 F.Supp. 1286, 1293; *see also Llanos v. Coehlo* (E.D.Cal.1998) 24 F.Supp.2d 1052, 1057.) "Steering" is "not an outright refusal to rent to a person within a class of people protected by the statute; rather it consists of efforts to deprive a protected home seeker of housing opportunities in certain locations. (*Fair Housing Congress v. Weber, supra*, 993 F.Supp. at p. 1293 (citing *HUD v. Edelstein*, (HUD ALJ 1991) Fair Hous.-Fair Lend. Rptr ¶ 25,018.) Attempting to "steer" families with children away from particular buildings or areas has been held to violate Section 3604(a). (*Southern California Housing Rights Center v. Krug* (C.D.Cal. 2007) 546 F.Supp.2d 1138, 1151.)

Although the evidence established that Prichard used the term "steer" when she asked Girod whether she should refer English to another property, we find that the record is inconclusive to establish a steering violation against respondent, as Prichard was not the

⁸ California courts rely on federal housing discrimination law to interpret analogous provisions of the FEHA. (*County of Alameda v. Fair Empl. & Hous. Com., supra*, 153 Cal. App.3d at p. 504.) The federal analog to Government Code section 12955, subdivision (k), also provides, inter alia, that it is unlawful to otherwise make unavailable or deny, a dwelling to any person because of ... familial status. (42 U.S.C. § 3604(a).)

decision maker, and did not exercise discretionary authority in determining where English should live.

Therefore, based on this record, we find that Prichard is not liable for violating Government Code 12955, subdivision (k).

D. Government Code section 12955, subdivision (g)

The DFEH also alleges that respondent should be found liable for aiding and abetting unlawful housing practices on the basis of familial status. Government Code section 12955, subdivision (g) makes it unlawful to “aid, abet, incite, compel, or coerce” any unlawful housing discrimination. (Gov. Code § 12955, subd. (g).)

Neither the FEHA nor case law provides a definition of “aiding and abetting” for housing discrimination. We have adopted a regulation describing aiding and abetting activity for the purposes of determining employment discrimination liability under the FEHA.⁹ Notably, under the regulation, an individual may be found liable as an aider or abettor when he or she assists in any act known to be unlawful employment discrimination, or encourages any person to violate the FEHA. (Cal. Code Regs., tit. 2, § 7287.7, subds. (a)(1) and (a) (2).)¹⁰ Similar to the above mentioned regulation, the common law definition of aiding and abetting allows for liability to be imposed when one helps another commit a prohibited act. (E.g. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) However, the words aid and abet “may fairly be construed to imply an intentional participation with knowledge of the object to be attained.” (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal. App.4th 1138, 1146, quoting *Lomita Land & Water Co. v. Robinson* (1908) 154 Cal. 36, 47.)

While both the DFEH and the CAA cite to the aforementioned regulation and the common law interpretation of aiding and abetting, they differ on significance of a respondent’s knowledge that an action is unlawful. The DFEH asserts that the regulation contains no requirement that knowledge of the law is needed to impose liability for aiding and abetting. The CAA argues that inherent in the analysis is an examination of whether respondent had knowledge of the law and if she intended to assist in violating the law.

⁹ Government Code section 12940, subdivision (i), provides that it is an unlawful employment practice for any person to aid, abet, incite, compel or coerce the doing of any acts forbidden by the FEHA, or to attempt to do so.

¹⁰ Section 7287.7, subdivision (a) provides:

“Aiding and Abetting. (a) Prohibited Practices. (1) It is unlawful to assist any person or individual in doing any act known to constitute unlawful employment discrimination. (2) It is unlawful to solicit or encourage any person or individual to violate the [FEHA], whether or not the [FEHA] is in fact violated. ...” (Cal. Code Regs., tit. 2, § 7287.7.)

We find that an individual may be found liable as an aider or abettor, in violation of Government Code section 12955, subdivision (g), when a preponderance of the evidence establishes that the respondent either (1) intentionally assisted another party with the knowledge the intended result was a discriminatory housing practice, or (2) encouraged another person to unlawfully discriminate in violation of the FEHA.

Whether Prichard is Liable for Aiding and Abetting Unlawful Housing Discrimination

The DFEH asserts respondent had sufficient intent to be found liable for aiding and abetting unlawful housing discrimination. The DFEH argues that respondent's testimony that she believed the property to be adult-only, and as such unsuitable for complainant and her family, is sufficient evidence of her intent to discriminate against English because of her familial status. Respondent asserts she had no knowledge of fair housing laws and never intended for her actions to result in harm to complainant. The CAA argues respondent acted with neither the intent to discriminate against complainant nor the knowledge that her actions would result in unlawful discrimination.

It is uncontested that after Prichard met English and her daughters at the AGM office, Prichard informed Girod, via written post-it note, that English had two children. However, the DFEH offered no evidence to establish Prichard had knowledge that AGM, Girod or the Danchuks would use the information to discriminate against English. Neither did the DFEH offer evidence to establish Prichard was involved in the rental process to the extent that she could encourage or influence Girod or the Danchuks in their decision making processes. Moreover, Prichard testified she wrote the note not with the intent to discriminate against English but instead to clarify whether Marina Drive was part of an adult-only community and to seek guidance on how to proceed if English's application was denied.

The DFEH established that Prichard informed English "the owner is not interested in [renting to] children." The DFEH asserts that this statement is evidence that Prichard not only assisted in the unlawful discrimination but had knowledge of it and encouraged it. The DFEH offered no evidence, however, that Prichard made the statement with the knowledge that doing so was a discriminatory housing practice or with the intent to assist AGM, Girod, or the Danchuks in unlawfully discriminating against English. Rather, the only evidence presented relating to Prichard's intent was her repeated assertions that she received no education on fair housing practices and had no intention to discriminate against English. Further, it is counter intuitive that Prichard would inform English she was the victim of unlawful discrimination if Prichard was advocating the unlawful action.

The record failed to establish Prichard knew, or intended, her actions to result in unlawful housing discrimination because of English's familial status. Therefore, we find Prichard is not liable for violating Government Code section 12955, subdivision (g).

ORDER

The accusation is dismissed.

The Commission designates section B, covering statements of preference (Gov. Code § 12955, subd. (c)) and section D, covering aiding and abetting (Gov. Code § 12955, subd. (g)), as precedential.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code sections 11523 and 12987.1, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be timely served on the Department, Commission, respondent and complainants.

Dated: January 27, 2010

FAIR EMPLOYMENT AND HOUSING COMMISSION

GEORGE WOOLVERTON

PATRICIA PEREZ

STUART LEVITON

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